UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AURORA FINANCIAL GROUP, INC., Plaintiff, v. MARY K. TOLLEFSON, et. al., Defendants.	CASE NO. C20-0297JLR ORDER DENYING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

Before the court is Defendant Mary K. Tollefson's motion to dismiss for failure to state a claim. (MTD (Dkt. # 4).) Plaintiff Aurora Financial Group ("Aurora") opposes the motion. (Resp. (Dkt. # 14).) The court has considered the motion, the relevant

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portions of the record, and the applicable law. Being fully advised, the court DENIES Ms. Tollefson's motion.[1]

II. BACKGROUND

On May 22, 2015, Ms. Tollefson refinanced her residential mortgage by executing a promissory note in favor of American Financial Network, Inc. ("American") for $279,924.00. (Not. of Removal (Dkt. #1), Ex. A (Dkt. # 1-2) at 2.)[2] Ms. Tollefson simultaneously executed a deed of trust to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for American, encumbering the real property in King County at 1316 6th Place NE in Auburn, WA 98002 ("the Property"), as collateral for the loan. (*Id.*, Ex. B (Dkt. # 1-3) ("Deed") at 2.) The deed of trust was recorded on June 11, 2015, with the King County Auditor under Instrument No. 20150611000745. (Compl. (Dkt. ## 1-5, 1-10) ¶ 6; *see generally* Deed.) MERS later assigned the deed of trust to Aurora, and this assignment was recorded with the King County Auditor on December 20, 2017, as Instrument No. 20171220000501. (Compl. ¶ 8; *see also* Not. of Removal, Ex. E (Dkt. # 7) ¶¶ 2-4; Resp. at 5 ("Aurora's authority to sue actually came from MERS's own extension of its assignment authority . . . .").)

However, there was an error on the deed of trust, which noted that the Property was located in "THE COUNTY" instead of "KING COUNTY." (Deed at 2.) The parties

[1] No party requests oral argument (*see* MTD at 1; Resp. at 1), and the court does not consider oral argument to be helpful to its disposition of Ms. Tollefson's motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

[2] Unless otherwise noted, all citations to page numbers refer to those provided by the court's electronic filing system ("ECF").

seemingly agree that this was a mutual mistake. (*See* MTD at 6 ("In reference to the county the property is located in, the referenced [deed of trust] names 'King' county [sic] twice. . . . Aurora makes no allegations that the single omission of a reference to 'King' county [sic] materially changed the deed of trust to something other than what was contemplated by the parties."); Resp. at 4 ("The overarching sentiment in [Ms. Tollefson's motion to dismiss] is that the reformation claim is not required because the parties *agree* that the intention of the [d]eed of [t]rust by other references within the document makes it clear the property was located in King County."); Reply at 2 ("Here, the facts are in accord with the parties belief that the property is in King County.").) Despite this apparent agreement, the parties proceed to litigate this issue, among others. (*See* Resp. at 4 (arguing that in lieu of moving for dismissal, Ms. Tollefson should be stipulating to an agreed issue).)

On January 31, 2020, Aurora filed a complaint against Ms. Tollefson in King County Superior Court. (*See generally* Compl.) Aurora alleges that Ms. Tollefson "has failed to make the monthly payment due on August 1, 2017, and in subsequent months," and accordingly, Aurora seeks to foreclose on the Property. (Compl. ¶ 21.) Specifically, Aurora seeks the following: (1) a reformation of the deed of trust (Deed at 2) changing "THE COUNTY" to "KING COUNTY"; (2) a declaration "that the reformed [d]eed of [t]rust is a valid lien against [the Property] and is senior to that of any and all other person(s)"; and (3) judicial foreclosure on the Property due to Ms. Tollefson's failure to pay her mortgage since August 1, 2017 (*see* Compl. ¶¶ 14, 19, 21, 28).

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Although Aurora initially filed its complaint in King County Superior Court, Ms. Tollefson removed the matter to this court on February 24, 2020. (Not. of Removal at 15.) Ms. Tollefson filed the present motion to dismiss for failure to state a claim on February 25, 2020, and she asserts that Aurora "failed to state a claim against MERS . . . because MERS is not a signatory to the deed of trust in question" and because Aurora "assumed the risk of the purported mutual mistake." (MTD at 3.) Ms. Tollefson also argues that Aurora "failed to state a claim against all defendants for reformation of the deed of trust because the parties willingly entered into the deed of trust without any misgivings that the property was located in King County, Washington" and Aurora assumed the risk of the mistake. (*Id.* at 5.)

Aurora maintains that its claims for reformation of the deed of trust and declaratory relief are solely against Ms. Tollefson and that "MERS is named in the [c]omplaint solely to extinguish any interest it may have in the subject property due to the fact that the [d]eed of [t]rust was recorded twice, and the recording number from the second recording is not contained in the [a]ssignment of [d]eed of [t]rust." (Resp. at 4.) In support of its response, Aurora also asks the court to take judicial notice of a statutory warranty deed executed by Ms. Tollefson. (RJN (Dkt. # 14-1) at 1-2, Ex. 1.)

The court now considers Ms. Tollefson's motion.

III. ANALYSIS

A. Aurora's Request for Judicial Notice

As an initial matter, Aurora asks the court to take judicial notice of a "[s]tatutory [w]arranty [d]eed conveying property from Mary Kay Tollefson . . . to Mary K [sic]

Tollefson," which was "recorded on April 29, 2013 in the records of King County, under Auditor's File No. 20130429000999." (RJN at 1-2.) The court may take judicial notice of a "fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "In considering a motion to dismiss, the court may 'take judicial notice of public records . . . .'" *Dunn v. BNSF Ry. Co.*, No. C17-0333JLR, 2017 WL 3670559, at *2, n.4 (W.D. Wash. Aug. 25, 2017) (citing *Fadaie v. Alaska Airlines, Inc.*, 293 F. Supp. 2d 1210, 1214 (W.D. Wash. 2003); *see also U.S. ex rel. Lee v. Corinthian Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011) (stating that courts may take judicial notice of "matters of public record" that are not "subject to reasonable dispute"); *Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2012 WL 909768, at *1, n.2 (W.D. Wash. Mar. 15, 2012) (taking judicial notice of a statutory warranty deed). Ms. Tollefson has not denied the accuracy of the statutory warranty deed appended to Aurora's request for judicial notice. (*See generally* Reply.) Accordingly, the court GRANTS Aurora's request and takes judicial notice of the statutory warranty deed.

B. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint "in the light most favorable to the non-moving party." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept "all well-pleaded factual allegations as true and . . . draw all reasonable inferences therefrom in favor of the plaintiff." *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 663 (9th Cir. 1998). Dismissal under Rule 12(b)(6)

"can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Although a complaint need not contain detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citations omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

C. Ms. Tollefson's Motion to Dismiss

Ms. Tollefson presents two arguments in her motion to dismiss: (1) Aurora failed to state a cause of action against MERS, and in fact cannot do so because "MERS is not a signatory to the deed of trust in question"; and (2) Aurora cannot state a claim for reformation of the deed of trust because Aurora assumed the risk of the mutual mistake regarding the typographical error. (MTD at 3, 5; *see also* Deed at 2.) The court now turns to Ms. Tollefson's arguments.

1. Whether Aurora Improperly Joined MERS as a Defendant

Ms. Tollefson apparently believes that Aurora fraudulently joined MERS as a defendant to this suit and that this means Aurora has failed to state a claim upon which relief can be granted. (*See* Reply at 3 (arguing that Aurora has fraudulently named MERS as a defendant).) This is incorrect. Ms. Tollefson misunderstands why Aurora joined MERS as a defendant in the first place. Aurora alleges that Ms. Tollefson "made, executed and delivered to [MERS], as nominee for [American], a [d]eed of [t]rust

encumbering the Property," which was "recorded on June 11, 2015." (Compl. ¶ 6.) Moreover, Aurora alleges that MERS "claim[s] some right, title or interest in the Property" through a "[j]unior [d]eed of [t]rust" in the amount of $279,924.00. (*Id.* ¶ 23.) Aurora notes that "[f]or the purposes of title, there appear to be two separate deeds," and "[a]s the second recorded [d]eed of [t]rust has never been assigned out of MERS, MERS is the appropriate party to name to ensure that the [d]eed of [t]rust is properly extinguished as part of the foreclosure." (Resp. at 4.)

State and federal law require the joinder of necessary parties "when the court cannot accord 'complete relief' to the existing parties without the absent party's participation." *See Blumberg v. Gates*, 203 F.R.D. 444, 446 (9th Cir. 2001); *see also State v. Evergreen Freedom Found.*, 404 P.3d 618, 628 (Wash. Ct. App. 2017). Washington courts have determined that MERS does not qualify as a beneficiary under Washington's Deeds of Trust Act because it does not hold the promissory notes that the deeds of trust secure. *See Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 37 (Wash. 2012) ("[I]f MERS does not hold the note, it is not a lawful beneficiary."); *see also* RCW 61.24 *et seq.* Nevertheless, "under *Bain*, 'the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable inquiry.'" *Good v. Fifth Third Bank*, No. 2:13-cv-02330-RSM, 2014 WL 2863022, at *3 (W.D. Wash. June 23, 2014) (citing *Bain*, 285 P.3d at 52)). Further, courts reject the notion that "MERS' participation taint[s] subsequent assignments and foreclosure actions." *Cagle v. Abacus Mortg., Inc.*, No. 2:13-cv-02157-RSM, 2014 WL 4402136, at *4 (W.D. Wash. Sept. 5, 2014).

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Here, out of an abundance of caution, Aurora names MERS as a party and alleges that MERS is a beneficiary of the deed of trust and claims a junior interest in the Property. (*See* Compl. ¶¶ 6, 23.) Aurora names MERS "solely to extinguish any interest it may have in the subject property due to the fact that the [d]eed of [t]rust was recorded twice, and the recording number from the second recording is not contained in the [a]ssignment of [d]eed of [t]rust." (*See* Resp. at 4 (citing Compl. at 8, 32).) The mere inclusion of MERS on the deed of trust, in and of itself, does not undermine Aurora's claims against Ms. Tollefson for reformation or foreclosure. *See Good*, 2014 WL 2863022, at *3; *Cagle*, 2014 WL 4402136, at *4.

More importantly, however, Ms. Tollefson fails to make any argument as to why the presence of MERS in this suit means Aurora has failed to state a claim against Ms. Tollefson. After construing the complaint in the light most favorable to Aurora, the court finds that Aurora has plausibly stated a claim for reformation, declaratory relief, and judicial foreclosure against Ms. Tollefson for failing to pay her mortgage since early 2017. (*See* Compl. ¶¶ 14, 19, 21, 28.)

2. Whether Aurora Assumed the Risk of a Mutual Mistake

Aurora argues that it may seek reformation of the deed of trust and declaratory relief if the parties made a mutual mistake by inadvertently substituting the word "THE" for "KING" in the legal description. (*See* Resp. at 3.) Ms. Tollefson asserts that Aurora has "failed to state a claim against all defendants" because it "cannot invoke mutual mistake where it assumed the risk of that mistake." (MTD at 5.) She also argues that "Aurora failed to present proof sufficient to reform the deed of trust." (Reply at 2

(bolding and capitalization omitted).) These are not coherent arguments on a motion to dismiss. Both parties apparently agree that the deed of trust should say "KING COUNTY" instead of "THE COUNTY." (*See* MTD at 6; Resp. at 4; Reply at 2; *see also* Deed at 2.) Nevertheless, Ms. Tollefson persists in arguing that Aurora cannot assert mutual mistake because it assumed the risk of such a mistake. (Mot. at 5-6; Reply at 3.) The purpose of a Rule 12(b)(6) motion is to "test the legal sufficiency" of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Aurora need not prove its claims at this point of the litigation. *See id.* Ms. Tollefson has not made any arguments suggesting that Aurora failed to establish a cognizable legal theory or that Aurora failed to allege sufficient facts to support a cognizable legal theory in its complaint. (*See generally* MTD.)

Thus, the court DENIES Ms. Tollefson's motion to dismiss because she failed to argue that Aurora failed to state a claim upon which relief can be granted. Moreover, the court finds the complaint sufficient to establish a plausible claim for relief against Ms. Tollefson.

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IV. CONCLUSION

For the reasons set forth above, the court DENIES Ms. Tollefson's motion to dismiss (Dkt. #4).

Dated this 24th day of July, 2020.

JAMES L. ROBART
United States District Judge